SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 804

LEWIS J. VALENTINE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF B. COLES NEIDECKER

No. 805

LEWIS J. VALENTINE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF GEORGE W. NEIDECKER

No. 806

LEWIS J. VALENTINE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF AUBREY NEIDECKER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

STATEMENT UNDER RULE

This appeal is made on behalf of the relators in three separate proceedings for writs of habeas corpus instituted [fol. 2] in the United States District Court, for the Southern District of New York. Because of the identical nature of the three proceedings and of the issues involved, the appeals have been consolidated into one record upon consent of the attorney for the relator and the attorneys for

the respondent in each proceeding, and by order of this Court.

Each of the relators herein applied by duly verified petition for a writ of habeas corpus, and a writ of habeas corpus was issued in each proceeding on July 26, 1935.

In each proceeding the respondent filed a return to the writ of habeas corpus on or about July 26, 1935. A traverse to the return was filed in each proceeding on or about August 12, 1935.

A hearing in the three proceedings was had before the Hon. Johnson J. Hayes, D. J., on August 12, 1935.

Following a joint decision on August 19, 1935, an order was made and entered in each proceeding on August 21, 1935, dismissing the writ of habeas corpus.

By order in each proceeding entered August 28, 1935 the relator's application for leave to appeal was allowed by Hon. Robert P. Patterson, D. J.

The relator in each proceeding is represented by Frederic R. Coudert, Jr., Esq., and the respondents in each proceeding are represented by Davis, Polk, Wardwell, Gardiner and Reed.

There has been no change of parties or attorneys since the commencement of the within proceedings.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

PETITION FOR WRIT OF HABEAS CORPUS (B. COLES NEIDECKER)

To the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York:

B. Coles Neidecker, your petitioner, respectfully shows:

(1) Your petitioner is unlawfully imprisoned and deprived of his liberty without his consent by Lewis J. Valentine, Police Commissioner of the City of New York, and some agent or subordinate of the said Police Commissioner, or other person whom he designates by the fictitious name of "John Doe"; said captor's real name being unknown to the petitioner.

(2) Under color of United States Statutes and the Extradition Treaty between the United States and the Republic of France of January 6, 1909 providing for the return to the said Republic of France from the United States of fugitives from justice of the former, petitioner is now unjustly deprived of his liberty and imprisoned in the Tombs, charged with a crime within the said Extradition Treaty.

(3) Said detention and imprisonment is unlawful and improper, and without legal warrant or authority, because:

(a) Your petitioner is a native born citizen of the United States;

[fol. 4] (b) Article V of the said Extradition Treaty between the United States and the Republic of France of January 6, 1909, which is the only Extradition Treaty bearing upon the subject in existence between the two nations, provides as follows:

"Article V. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

(c) That by reason of the existence of the said provision in the only Treaty of Extradition in existence between the United States and the Republic of France, the President of the United States has no constitutional power or authority to surrender a citizen of the United States to the said Republic of France.

(d) That the complaint, under cover of which your petitioner is held, does not charge any extraditable offense under the provisions of the said Treaty of 1909, concluded between the United States and the Republic of France, were said Treaty of binding effect.

(e) Your petitioner is not guilty of any extraditable offense under the provisions of said Treaty of 1909, were said Treaty of binding effect.

(f) All proceedings had, or attempted to be had before the authorities of the State of New York under the said complaint and warrant are illegal, void and without authority in law because the said authorities did not have jurisdiction over the person of this petitioner.

(4) No previous or other application has been made for this or similar relief.

[fol. 5] Wherefore, petitioner prays that Your Honor will grant a writ of habeas corpus, directed to the Honorable Lewis J. Valentine, Police Commissioner of the City of New York and to the Warden of the Tombs Prison, in the City of New York, and to any and all person or persons having your petitioner in custody, requiring him and them to produce before Your Honor immediately the body of your petitioner, together with the alleged grounds of his said detainment and imprisonment, that the legality and propriety of his confinement and detention may be inquired into according to law.

Dated July 26, 1935.

B. Coles Neidecker, Petitioner. Frederic R. Coudert, Jr., Attorney for Petitioner.

(Verified by B. Coles Neidecker this 26th day of July, 1935.)

[fol. 6] PETITION FOR WRIT OF HABEAS CORPUS (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

PETITION FOR WRIT OF HABEAS CORPUS (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 7] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS (B. COLES NEIDECKER)

President of the United States of America to Lewis J. Valentine and "John Doe" or any other person having the custody of B. Coles Neidecker, Greeting:

We command you that you have the body of B. Coles Neidecker by you imprisoned and detained as it is said together with the time and cause of said imprisonment and detention, by whatever name the said B. Coles Neidecker is

called or charged, before Honorable Francis J. Caffey, or one of the other Judges of the United States District Court for the Southern District of New York, at the United States Court Rooms or Post Office Building, Borough of Manhattan, City of New York, in Room 235, on the 26th day of July, 1935, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

Witness, Honorable Francis G. Caffey, United States District Judge for the Southern District of New York, this 26th day of July, 1935.

By the Court.

Charles Weiser, Clerk. Frederic R. Coudert, Jr., Attorney for Relator, 2 Rector Street, Borough of Manhattan, New York City.

Let the foregoing writ issue.

Francis G. Caffey, Judge of the United States District Court for the Southern District of New York.

[fol. 8] Writ of Habeas Corpus (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

Writ of Habeas Corpus (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 9] In United States District Court

Return to Writ of Habeas Corpus (B. Coles Neidecker)

To the Honorable Francis G. Caffey, United States District Judge:

In obedience to the within Writ of Habeas Corpus I herewith produce the body of B. Coles Neidecker, and for cause

of his detention show that said B. Colcs Neidecker is held in custody pursuant to a warrant of the Honorable Garrett W. Cotter, United States Commissioner, true copy of which is annexed hereto.

Dated New York, N. Y., July 26, 1935.

Edward T. V. Fitzgerald, Detective 1 Grade #689, Police Dept., City of N. Y.

[fol. 10] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Extradition of BERTRAND COLES NEIDECKER, Aubrey Neidecker, and George William Neidecker, Fugitives from the Justice of the French Republic

COMPLAINT ON EXTRADITION

To the Honorable Judges of said Court:

Your complainant, Pierre Moeneclaey, having first been duly sworn deposes and says:

1. I am the acting Consul General of the French Republic in the City of New York, and in this matter I act for and on behalf of the Government of the French Republic.

2. I have received a cable from the Ministry of Foreign Affairs of the French Republic in Paris, sent in the diplomatic code, a translation of the text of which is as follows:

"July 24, 1935. By cable I requested on July 23rd, the Embassy [French Embassy in Washington] to ask the American Government to arrest provisionally with a view to ultimate extradition the three Neidecker brothers, ac-[fol. 11] cused of fraud and breach of trust (abus de confiance) and larceny and obtaining property by false pretenses (escroquerie) by Prosecuting Attorney for the Department of the Seine. Kindly confirm to the American authorities the petition for extradition of the French Government. There exists a warrant of arrest which will be forwarded with legal evidence as promptly as possible."

3. Upon information and belief, the three Neidecker brothers (Bertrand Coles, Aubrey and George William)

were and are bankers and officers of the Travelers Bank of Paris, France.

4. Upon information and belief, the Travelers Bank has been closed, and a warrant or warrants have been issued in France for the arrest of Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker for the crimes of fraud and breach of trust (abus de confiance) and larceny and obtaining money, valuable securities or other property by false pretenses (escroquerie), and upon information and belief the amount of money or the value of the property which the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker are charged with having misappropriated is more than $200 or 1,000 francs.

5. I am informed and believe that Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker have fled outside the boundaries of the Republic of France, that warrants for their arrest cannot be served in France, [fol. 12] and that said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker have sought an asylum within the jurisdiction of the United States and may be found in the State of New York and City of New York, and in the Southern District of New York.

6. The crimes which the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker are charged to have committed in the French Republic are among the offences enumerated in the Treaty existing between the United States and the French Republic signed January 9, 1909, proclaimed July 26, 1911, and more particularly referred to in Article II, Sections 7 and 8 of said Treaty, copies of the English and French texts of which are as follows:

"7. Fraud or breach of trust by a bailee, banker, agent, factor, executor, administrator, guardian, trustee or other person acting in a fiduciary capacity, or director or member or officer of any company, when such act is made criminal by the laws of both countries, and the amount of money or the value of the property misappropriated is not less than two hundred dollars, or one thousand francs.

Embezzlement by public officers or depositaries; Embezzlement by persons hired or salaried, to the detriment of their employers.

8. Larceny; obtaining money, valuable securities or other property by false pretenses, when such act is made criminal by the laws of both countries, and the amount of money of the value of the property fraudulently obtained is not less than two hundred dollars or one thousand francs."

"7° Abus de confiance, détournement soit par des dé- [fol. 13] positaires publics, soit par des officiers ministériels ou publics; détournement par une personne salariée au préjudice de son patron, détournement ou soustraction par aubergiste, voiturier, batelier ou leurs préposés lorsque ces actes sont punis par les lois des deux pays et lorsque le montant des sommes ou valeurs sur lesquelles porte l'infraction n'est pas inferieur à 200 dollars ou 1,000 francs.

8° Escroquerie, vol, lorsque ces actes sont punis par les lois des deux pays et lorsque le montant des sommes ou valeurs sur lesquelles porte l'infraction n'est pas inférieur à 200 dollars ou 1,000 francs."

7. Through diplomatic channels, your complainant is informed and believes that requisition for the above-named fugitives, Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker is about to be made, accompanied by the formal papers upon which demand for extradition is founded.

Whereupon your petitioner, acting under the authority and in the behalf stated, prays the consideration of this petition and that warrants may issue for the arrest of the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker charged as aforesaid, that they may be brought before a commissioner or magistrate qualified to act in extradition matters, to the end that evidence of criminality may be heard, and if, on such hearing he deems the evidence sufficient to sustain the charge under the provisions of said treaty, said magistrate or commissioner shall certify the same to the Secretary of State, at Washington, D. C., in order that warrants may issue upon [fol. 14] the requisition of the proper authority of said foreign government for the surrender of the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker according to the stipulations of said treaty, and for such other action as the said commissioner or magis-

trate is required under the provisions of said treaty and the laws of the United States to take.

Dated at New York, N. Y., July 25, 1935.

P. Moeneclaey.

Subscribed and sworn to before me this 25th day of July, 1935. Garrett W. Cotter, United States Commissioner, Southern District of New York. (Seal.)

UNITED STATES OF AMERICA,
Southern District of New York, ss:

To the Marshal of the United States and to his Deputies and any or either of them, and to the Police Commissioner of the City of New York, or any Peace Officer within said City: Greeting:

Whereas, complaint on oath has been made to me charging that Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker are in the City, State and Southern District of New York as fugitives from the justice of the French Republic, and charging said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker with having committed within the jurisdiction of [fol. 15] the French Republic on June 12, 1935, the crimes of fraud and breach of trust (abus de confiance) and larceny and misappropriation of property (escroquerie), said crimes being provided for by the Treaty or Convention for Extradition between the Government of the United States of America and the Government of the French Republic signed January 9, 1909 and proclaimed July 26, 1911, as set forth in the sworn complaint of Pierre Moeneclaey hereto attached.

Now, therefore, you are hereby commanded in the name of the President of the United States of America to apprehend the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker and bring them forthwith before me or some Judge, Justice or Commissioner of the United States, wherever in the Southern District of New York they may be found, that the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker may be then and there dealt with according to law.

Given under my hand and seal, in the year of our Lord, July 25, One Thousand Nine Hundred and Thirty-Five.

Garrett W. Cotter, United States Commissioner for the Southern District of New York. (Seal.)

[fol. 16] RETURN TO WRIT OF HABEAS CORPUS (GEORGE W. NEIDECKER)

Not printed because identical in content to that in proceeding of B. Coles Neidecker.

RETURN TO WRIT OF HABEAS CORPUS (AUBREY NEIDECKER)

Not printed because identical in content to that in proceeding of B. Coles Neidecker.

[fol. 17] IN UNITED STATES DISTRICT COURT

TRAVERSE TO RETURN (B. COLES NEIDECKER)

The petitioner herein traverses the return of the respondent herein and alleges as follows:

1. He reiterates each and every allegation contained in his petition for a writ of habeas corpus heretofore issued herein.

2. He alleges that all proceedings had, or attempted to be had, before the United States Commissioner in the Southern District of New York upon the complaint herein and the warrant issued by him are illegal, void and without authority of law because he did not have, and has not had, jurisdiction over the person in this petition.

3. He alleges that by reason of the facts set forth in his petition for a writ of habeas corpus, he is being deprived of his liberty without due process of law.

Dated New York, N. Y., August 12th, 1935.

B. Coles Neidecker, Petitioner.

Sworn to before me this 12th day of August, 1935. Thomas B. Moran, Notary Public, Queens County. Queens Co. Clk. No. 1992 Reg. No. 1617. Certificate filed in Nassau County. N. Y. Co. Clk. No. 718, Reg. No. 6-M-423. Commission expires March 30, 1936.

[fol. 18] TRAVERSE TO RETURN (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

TRAVERSE TO RETURN (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 19] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

Before Hon. Johnson J. Hayes, District Judge

[fol. 20] New York, August 19, 1935, 11 a. m.

Appearances:

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Appearing on behalf of the Govern- of the French Republic; Porter R. Chandler, Esq., of Counsel.

Coudert Brothers, Representing the Petitioners Aubrey Neidecker, B. Coles Neidecker, and George Neidecker; Frederick C. Bellinger, Esq., of Counsel.

MEMORANDUM DECISION

HAYES, J.:

The Court: Gentlemen I have read the briefs that have been submitted here and read the authorities, as best I could during the spare time I have had, and I have come to the conclusion that the petitions for writs of habeas corpus should be denied, and that the writs which have been granted should be discharged.

I will concede that the clause in the Mexican Treaty, until its recent modification, is identical with the Clause V in the Franco-American Treaty; that so far as the relationship of our Government with the Government of Mexico, while that clause remains the same, is concerned, that the precedent, I believe, of judicial authority and executive construction was to treat the clauses as excluding or denying [fol. 21] the right of the Government to extradite one of its own citizens. I think, however, it is significant that the Treaty with Mexico has been amended since the McCabe decision so as to expressly provide for the exercise of discretion on behalf of the Executive to grant the extradition of one of its own citizens.

The clause seems to be one of very general use in treaties in a great number of nations. So far as the authorities submitted to me are concerned, there seem to have been but two courts that have passed upon the clause or have construed it. The United States District Court in the application of one McCabe, in the year 1891, 46 F. 363, I believe it was, held that the clause in question did not give the Executive power to exercise any discretion, and that under that clause a citizen could not be extradited. The other deci-

sion is one of the Queen's Bench, in re Galwey, decided I believe in 1896, 1 Q. B. 230. That court was construing the same clause. After the English court had held that the clause gave the Executive discretionary power to extradite one of its citizens, no other court, so far as I know, has had occasion to construe the clause. Eight years after the McCabe decision was rendered, the Treaty between Mexico and America was altered, and that clause contained an express provision that the Executive might in his discretion extradite a citizen.

I am of the opinion, and would undoubtedly hold, in the absence of the amendment of the Mexican Treaty eight years after the McCabe decision, that no authority would exist to extradite one of our citizens to Mexico, because the parties themselves, by their course of conduct, had adopted that construction of the clause; but I do not think [fol. 22] it follows that the same interpretation which our government placed on that clause of the treaty with Mexico should be followed with all the other nations where a similar clause appears in the treaty. In other words, while the practice with Mexico over a long period of time has given that clause, insofar as it pertains to Mexico, that definite meaning, my attention has not been called to similar practice with any other country where the treaty contains the same clause; moreover, the decision of the English court, five years after the McCabe case, holding that the clause gives the Executive discretionary power to extradite a citizen, and the abrogation made of the former practice indulged in with respect to Mexico by our own country, indicates, to my mind, that this clause which affects so many nations should not be given a narrow judicial interpretation, and that the court should be slow to hold that an executive is without any power whatever to extradite a citizen, but that the reasoning of the situation suggests an interpretation in harmony with the English court, giving to the executive discretionary powers rather than to hold that he had no power in the premises. The first clause in the treaty expressly provides for the extradition of persons, without limitation, who have violated the laws of one country and taken asylum in the other. I do not believe that Clause V was intended to remove all the power which was conferred in Clause I of the Treaty. Persons adept in the use of both the French and the English language in phrasing the treaty

would have used words more definitely expressive of the intention to exclude the provision as to citizens if that had been the intention of the parties. If Clause I had not been [fol. 23] intended to include all persons, it is difficult to understand why they did not say persons "except citizens" who violate the law shall be extradited.

I do not hold that the American Government is compelled by the Treaty to grant the extradition of these petitioners. I merely hold that, in the opinion of the Court, the executives of the American Government have the discretion to grant the extradition. The power to do so is expressly contained in Clause I. The effect of Clause V is not to exclude, but it is to confer upon the executive the discretion when one of its citizens is the subject of extradition. I think that the term that the contracting party should "not be bound to surrender" is used in the sense that the party is not compelled to do so, and vests in the executive the discretion in the premises.

Mr. Bellinger: If your Honor please, I most respectfully except to your Honor's ruling, and I ask that we may take our appeal to the Circuit Court of Appeals, and I would further ask, if your Honor please, that you allow the three petitioners to continue in the custody of my partner, Mr. Frederic R. Coudert, Jr. I do not think that any of them have any intention of leaving; they came home and they desire to stay here. One of my clients was decorated in France for bringing down a German plane. He has led a very fine life——

The Court: Let me interrupt you just to point out one further thing in this oral opinion by the Court. The parties here have not been given a preliminary hearing. I am assuming that under the decisions of the United States Supreme Court, that the sole question which I have for consideration here is one of jurisdiction; that is, whether in any event, the United States Commissioner or any other [fol. 24] tribunal had any power in the premises to extradite one of our citizens to France.

Mr. Chandler: That is correct, your Honor.

The Court: And I am also assuming that there is not any controversy about the fact these petitioners are citizens of the United States.

Mr. Chandler: They are so described in the request for extradition which we have had from the Paris police. We will fully concede they are native-born American citizens.

The Court: Let me go one step further. The position has been urged upon this Court that this Court should follow the law laid down in the McCabe case and the interpretation of the clause as adopted by the Secretaries of State construing the same clause in our relationship with Mexico. The point the petitioners urge is that it was the unbroken practice indulged in by the Secretary of State in this country. My attention has not been called to any specific instance where the Secretary of State has so ruled in our dealings with the French Republic or with any other nation where the treaty contains this same clause. If it had been true, as contended by the Petitioners, that the Secretary of State here holds that no power exists under this treaty to extradite the petitioners, what the Court has said here will not deprive the Secretary of State of the exercise of that right. The Court is of the opinion that if the position which the petitioners take in that respect is tenable, that the proper forum to present that relief is to the Executive Department rather than to the judicial branch.

Just so that we can clarify one thing. I am not trying to bind the hands of the Secretary of State; I think it is [fol. 25] entirely with him to do as he deems proper under the circumstances, but I do not think this Court should adopt an ironclad rule and say no American citizen who commits a crime in France and takes refuge here, fleeing from his crime in France, could be extradited and sent back there for trial. I do not think this Court should say that in the face of this language and in view of what has been said by the only two courts that have had occasion to pass upon it. I have great respect for the United States District Court of Texas, and I also have great respect for the opinions of Secretaries of State who have interpreted that same clause. On the other hand, I have profound respect for the decision of these three English Judges who decided the Galwey case and the reasoning in that case, and the interpretation which they place upon that clause, it seems to me, is unanswerable. Since our own country, having exercised that uniform course of conduct with Mexico, I would be bound to follow it, unless they had changed the treaty. The fact that they came together and changed that eight years after the McCabe decision indicated that our Government wanted to get out of the predicament it was in. It

is also significant to me that this occurred also after the decision which had been rendered by the English court.

Mr. Bellinger: If your Honor please, I understood your Honor to say in your opinion that had not the Treaty with Mexico been changed, that is if the present treaty continued using the same words that the French treaty used, you would hold that the American nationals could not be returned to Mexico. Am I right?

The Court: That is what I said, but I intimated that the clause is not free from ambiguity, and the parties themselves had placed a practical construction upon that very clause, by which both contracting parties agreed that it would not confer upon either the right to extradite their own citizens.

[fol. 26]

Mr. Bellinger: Under the laws of France, it is against the law for France to extradite a French national.

The Court: That law, according to your brief, was not enacted until 1927, after the treaty had been adopted in 1909.

Mr. Bellinger: But that is the present law in France today.

The Court: Just a moment. If that had been the law at the time that this treaty was adopted in 1909, I would hold with you without question, but up until the adoption of the treaty in 1909 there was no restriction between the two Governments of France and America with respect to extraditing their own citizens. There was no restriction at all. It was first introduced in 1909. At that time there was no restriction, so far as you gentlemen called my attention to, on the part of the French Government to extradite one of its own citizens; but in 1927 France passed a law that prohibits the extradition of its citizens. I do not see how the law passed in 1927 by France could throw any light on the clause which we are referring to, an ambiguous clause contained in the treaty of 1909.

Mr. Bellinger: That, your Honor, illustrates the course of conduct, and if we are going to have one course of conduct towards Mexicans, or when we are dealing with Mexicans, where the same phraseology is in the treaty, your

[fol. 27]

Honor makes one interpretation, and in dealing with Frenchmen, having the same phraseology in effect in the treaty, your Honor distinguishes between those two courses, saying that the Mexican course of conduct was different; that the course of conduct there is different.

Now I do not know that there has always been the same course of conduct between France and the United States.

The Court: You did not call to the Court's attention any specific instances where our Government and the French Government had placed that interpretation on that clause. I do not recollect whether the question had arisen between the two Governments. I do not know how they have acted on it.

Mr. Chandler: The State Department has cited the McCabe case in an informal connection with respect to extradition treaties. They have indicated that, and it seems it would be lacking frankness if I did not tell your Honor that. I have no specific documents on that, but it seems that such requests have come from some other countries, and I believe, in some instances, the State Department has said, in effect, we would like to send American citizens back, but that under Judge Maxey's decision we have not got the power. I call your Honor's attention of course also to the fact that Italy has flatly refused to extradite any Italian under any circumstances. But on the other hand, we have and still do surrender American citizens to Italy, and the Supreme Court upheld that practice in Charlton v. Kelly, which is cited in my brief.

Mr. Bellinger: This is this still further point, your Honor: we are here in the United States Court, and we have [fol. 28] the American law with us; we have four Secretaries of State who have so decided. There are no American decisions to the contrary. Therefore it is the American law. My opponent, Mr. Chandler, has presented some English cases. We are contending for the American law, that we should be bound by the American law unless there is a conflict in American law, and at that time we should look to the other side, to the British, the French or any other European law.

The Court: I have never understood that one district could establish a rule of law that was binding on all other District Judges. I stated in my oral opinion that were the same facts before me that were before Judge Maxey in the McCabe case, I would hold as he did, but many things have happened since that decision that I think force the conclusion that I have adopted here. It is not a question of exercising a preference, whether I will disregard American law and will follow English cases. I think that when

we deal with questions here of such great international concern, we should consider and have decent respect for the opinions of mankind generally, and particularly to able judges wherever they may be found, instead of restricting it to a technical definition of the meaning of a treaty clause which is of such general international use. For that reason I do not think it calls for any adherence to any particular tribunal, but it just calls for an honest endeavor to find out, if the Court can, the intention of the contracting parties, and what I am saying is that the reasoning in the in re Galway case appeals to this Court, that the course of conduct of our own country with respect to Mexico has been altered, and that our country has manifested a desire to get away from the interpretation that [fol. 29] was placed there by the Secretary of State and by the United States District Court by amending the Mexican treaty.

What have you to say about the parole of these defendants pending appeal?

Mr. Chandler: I think the appeal can be presented fairly shortly. I think our Circuit Court of Appeals calendar is quite up to date. I am not sure whether such cases are not given a preference. I have the greatest respect for Mr. Coudert; but I do not know whether paroling in the custody of an attorney or placing fairly low bail would be better; I think either would be satisfactory, in your Honor's discretion.

The Court: I do not know anything about this paroling in the custody of an attorney. Is that indulged in here?

Mr. Bellinger: I think, your Honor, there has been an exception made in this case. As I said before, your Honor, this man is a war hero. He has not been convicted of any crime. I have got the greatest respect for the French Government—I am partly French myself. It may turn out that this man may be innocent after he had spent some time in jail. Therefore I am going to ask your Honor, in view of the fact that the Circuit Court of Appeals does not sit until October, to either release this man in my partner's, Mr. Coudert's, custody, or fix a nominal bail. In other words, I do not want my clients in jail during that time.

The Court: Have you any suggestion as to the amount of bail?

Mr. Chandler: We will be satisfied with $5,000 each, your Honor.

The Court: I suppose they can give that?

[fol. 30] Mr. Bellinger: I can get bail, your Honor, although these petitioners are in the Bankruptcy Court and they couldn't give anything themselves.

The Court: They may be released on bail in the sum of $5,000 each pending the appeal to the Circuit Court of Appeals. I do not know what the rule is here about perfecting this appeal. Ordinarily in the Circuit Court the Circuit Court grants release but not until the papers have been presented to the Court. Have you any rule here in regard to that? What is your rule?

Mr. Manning: Here the rule is that the Court of Appeals fixes bail, and when the Court of Appeals is not sitting, application may be made to the District Court for relief.

The Court: That is what I suggest. You have merely stated in open court that you are going to appeal.

Mr. Chandler: The record is so short that it can be made up quickly, without any difficulty. I would have no objection if your Honor paroled the petitioners in Mr. Coudert's custody for another week and the appeal may be perfected within that time.

Mr. Manning: I might suggest counsel make application to one of the Circuit Court Judges.

Mr. Bellinger: We have no objection to the amount of bail suggested by Mr. Chandler and I would ask for one week in which to furnish bail. We will probably furnish it much sooner.

(Discussion off the record.)

The Court: I wish you gentlemen would confer, and any papers you desire for me to sign, I would be glad if you could do that and have them here ready for signature by Thursday.

Mr. Chandler: I think it could be done. I think we can do that by Thursday.

[fol. 31] IN UNITED STATES DISTRICT COURT

Present: Honorable Johnson J. Hayes, United States District Judge.

In the Matter of the Application of B. COLES NEIDECKER for a Writ of Habeas Corpus

ORDER APPEALED FROM (B. COLES NEIDECKER)—Aug. 21, 1935

This cause came on to be heard upon the petition for the writ of habeas corpus herein, the writ of habeas corpus, the return to said writ and the warrant annexed thereto, the intervening petition of Pierre Moeneclaey, Acting Consul General of the French Republic, and the order entered thereon, and the traverse to said return; and the relator having been duly produced before the Court in obedience to the writ, and the cause having been argued on behalf of the relator by Frederic R. Coudert, Jr., Esq., and on behalf of the respondents by Porter R. Chandler, Esq., and the Court having made summary inquiry into the facts, and it appearing to the Court, and the Court having thereupon found and determined:

1. That the relator is held in custody pursuant to a warrant of the Honorable Garrett W. Cotter, United States [fol. 32] Commissioner, as set forth in the return to the writ herein, and

2. (Upon the concession of all parties in open Court) that the relator is a native-born citizen of the United States,

And due deliberation having been had and the Court having rendered its opinion herein,

Now, therefore, upon all of the foregoing and upon all the proceedings herein, on motion of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the respondents, it is

Ordered, adjudged and decreed, that the writ of habeas corpus herein be and the same hereby is dismissed on the merits, and that the relator be remanded to the custody from which he came, subject, however, to the provisions of this order.

And the relator by his counsel having given notice in open Court of his intention to appeal from the dismissal

of the writ herein to the United States Circuit Court of Appeals for the Second Circuit, and having made application to be admitted to bail pending the determination of said appeal, upon motion of Coudert Brothers, attorneys for the relator, it is further

Ordered,

1. That the relator be paroled in custody of his counsel, Frederic R. Coudert, Jr., Esq., until 4 p. m. on Wednesday, August 28, 1935, and

2. That upon the presentation and allowance of a petition for appeal on behalf of the relator prior to 4 p. m. on Wednesday, August 28, 1935, and upon giving prior to said time a bond with sufficient surety in the sum of Five Thou- [fol. 33] sand Dollars ($5,000), in form to be approved by this Court, conditioned upon the obedience by the relator to any further order of this Court or of the United States Circuit Court of Appeals for the Second Circuit, the relator be admitted to bail in said sum of Five Thousand Dollars ($5,000) pending the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be, and that pending such final determination, all proceedings for the extradition of the relator as a fugitive from the justice of the French Republic be stayed.

(Sgd.) Johnson J. Hayes, United States District Judge.

Approved as to form, and notice of settlement waived. Coudert Brothers, Attorneys for Relator. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents.

[fol. 34] Order Appealed From (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

Order Appealed From (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

[fol. 35] In United States District Court

Petition for Leave to Appeal (B. Coles Neidecker)

The petitioner, B. Coles Neidecker, by his attorney, Frederic R. Coudert, Jr., Esq., feeling aggrieved by the order and judgment made and entered on the 21st day of August, 1935, by this Court, dismissing the writ of habeas corpus herein on the merits and remanding the Relator to the custody from whence he came subject to the provisions of said order and judgment, does hereby appeal from said order and judgment of the Court to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings, upon which the said order and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that meanwhile and pending the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be, the extradition of B. Coles Neidecker as a fugitive from the justice of the French Republic, be stayed.

Dated New York, August 28, 1935.

Frederic R. Coudert, Jr., Esq., Attorney for Relator, Office & P. O. Address, No. 2 Rector Street, Borough of Manhat-an, City of New York.

[fol. 36] Petition for Leave to Appeal (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Cole Neidecker.

Petition for Leave to Appeal (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Cole Neidecker.

[fol. 37] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS (B. COLES NEIDECKER)

Now comes the Appellant in the above-entitled cause before the United States Circuit Court of Appeals for the Second Circuit in the Borough of Manhattan, City of New York, and files the following assignment of errors in the record and proceedings aforesaid, upon which he will reply upon the prosecution of the appeal in the above entitled cause from the judgment and order made and entered herein on the 21st day of August, 1935.

The Court erred in dismissing the writ of habeas corpus herein on the merits and in remanding the relator to the custody from which he came for the following reasons:

1. The Court erred in its conclusion that the executive officers of the Government of the United States have the discretion to grant the extradition of the appellant, who is a citizen of the United States.

2. The Court erred in interpreting and construing the Extradition Treaty of 1909 between the United States and the Republic of France as conferring upon the executive officers of the Government of the United States the discretion to grant the extradition of the appellant, who is an American citizen.

3. The Court's interpretation and construction of the Extradition Treaty of 1909 between the United States and the Republic of France, as conferring upon the executive [fol. 38] officers of the Government of the United States the discretion to grant the extradition of the appellant, an American citizen, renders such Treaty in contravention of the Constitution of the United States and in particular of Section 1 of Article I thereof, of Section 2 of Article II thereof, and of Amendment V thereto.

4. The decision of the Court was and is contrary to the Constitution and laws of the United States.

Whereas by the law of the land said writ should have been sustained, and the Relator herein, by his attorney, Frederic R. Coudert, Jr., Esq., prays that the errors aforesaid, the judgment and order made on the 21st day of

August, 1935, may be reversed and for naught held and esteemed, and that the said appeal herein be sustained and the appellant herein be released from the custody in which he is held, and that the bond for $5,000. be cancelled and the Surety discharged therefrom, and for such other, further, additional, different and general relief as may to this Court seem just and proper in the premises.

Dated New York, August 28th, 1935.

Frederic R. Coudert, Jr., Attorney for Relator, Appellant, Office & P. O. Address, No. 2 Rector Street, New York City.

[fol. 39] ASSIGNMENT OF ERRORS (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bond stated therein is $2500.

ASSIGNMENT OF ERRORS (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bond stated therein is $2500.

[fol. 40] IN UNITED STATES DISTRICT COURT

Present: Hon. Robert P. Patterson, U. S. D. J.

[Title omitted]

ORDER ALLOWING APPEAL (B. COLES NEIDECKER)—Aug. 28, 1935

On reading the petition of B. Coles Neidecker, made by Frederic R. Coudert, Jr., his attorney, on his behalf dated the 28th day of August, 1935, for appeal, and on consideration of the assignment of errors presented herewith and a bond for costs in the sum of $250.00 having been approved herewith, it is

[fol. 41] Ordered that the appeal herein be allowed as prayed for; and it is further

Ordered that a certified transcript of the record, papers and proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit; and it is further

Ordered that the applicant herein, B. Coles Neidecker, be and he hereby is released to bail in the sum of $5,000 upon his filing with the Clerk of this Court a bond or undertaking to be approved by a judge of this Court in said amount, conditioned that he will abide by the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be; and it is further

Ordered that the extradition of B. Coles Neidecker be stayed pending the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be.

Robert P. Patterson, U. S. D. J.

August 28th, 1935.

Bail in the sum of $5,000 consented to.
Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents.

[fol. 42] Order Allowing Appeal (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

Order Allowing Appeal (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

[fol. 43] Citation, in usual form (B. Coles Neidecker), omitted in printing.

[fol. 44] CITATION (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

CITATION (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Titles omitted]

STIPULATION CONSOLIDATING APPEALS AND AS TO CORRECTNESS OF TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true copy of the transcripts of the record [fol. 46] the United States District Court in each of the above entitled proceedings as agreed on by the parties, and it is

Further stipulated and agreed that the appeals taken by the relators B. Coles Neidecker, George W. Neidecker and Aubrey Neidecker in the above entitled proceedings be consolidated and that the records of such appeals may be printed together under one cover and certified as one appeal by the Clerk of the United States District Court, Southern District of New York, and considered by the Clerk of said Court and the Clerk of the United States Circuit Court of Appeals for the Second Circuit as such.

Dated, October 14, 1935.

Frederic R. Coudert, Jr., Attorney for Relators.
Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents.

[fol. 47] IN UNITED STATES DISTRICT COURT

ORDER CONSOLIDATING APPEALS

On reading and filing the foregoing stipulation, it is

Ordered, that the appeals taken by the relators B. Coles Neidecker, George W. Neidecker and Aubrey Neidecker in the above entitled proceedings be, and the same hereby are, consolidated and the records of such appeals may be printed together under one cover and certified as one appeal by the Clerk of the United States District Court, Southern District of New York, and considered by the Clerk of the said Court and the Clerk of this Court as such.

Oct. 15/35.

Manton, U. S. Circuit Judge.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 49]

STIPULATION AND ORDER OF SUBSTITUTION OF FRENCH CONSUL GENERAL

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "Joe Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

ORDER

Upon reading and filing the annexed stipulation, and sufficient cause being shown therefor, it is

Ordered that Charles de Ferry de Fontnouvelle, Consul General of the French Republic in New York, be and he

[fol. 50] hereby is substituted as an intervening party respondent and appellee in each of these cases in the place and stead of Pierre Moeneclaey, former Acting Consul General of the French Republic in New York, without prejudice to the proceedings already had therein, and that these proceedings may be continued and maintained against said Charles de Ferry de Fontnouvelle, as successor to said Pierre Moeneclaey.

Dated New York, N. Y., December 5, 1935.

Wm. Parkin, Clerk.

Filed 12/5/35.

[Same title]

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto as follows:

1. Pierre Moeneclaey, former Acting Consul General of the French Republic in the City of New York, who was heretofore granted leave to intervene as a party respondent in each of these cases under date of August 12, 1935, has since that date ceased to be such Acting Consul General.

2. Charles de Ferry de Fontnouvelle is now Consul General of the French Republic in the City of New York, as successor to said Pierre Moeneclaey, and is desirous of being substituted as an intervening party respondent in these cases in his place and stead.

3. An order in the form annexed to this stipulation may be entered by the attorneys for any party hereto without [fol. 51] notice.

Dated New York, N. Y., December 4, 1935.

Frederic R. Coudert, Jr., Attorney for Relators-Appellants. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents-Appellees.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES ex Rel. B. COLES NEIDECKER, Appellant,

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, Appellee

UNITED STATES ex Rel. GEORGE W. NEIDECKER, Appellant,

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, Appellee

UNITED STATES ex Rel. AUBREY NEIDECKER, Appellant,

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, Appellee

Before Manton, L. Hand and Chase, Circuit Judges

Appeals from three orders of the District Court for the Southern District of New York, dismissing writs of habeas corpus to review orders of a United States Commissioner, holding the relators pending extradition proceedings under § 651, Title 18, U. S. Code.

Frederick R. Coudert, Jr., for the appellants.
Porter R. Chandler, for the appellee.

[fol. 53] L. HAND, Circuit Judge:

These are appeals from the denials of writs of habeas corpus to review the legality of the relators' detention in the following circumstances. Citizens of the United States, they were taken into custody by the respondent, Valentine, police commissioner of New York, upon cable request from the proper French authorities; the charge against them concerned financial dealings in Paris, whence they had fled to New York to escape arrest. Upon the request of the "acting" French consul, a United States Commissioner for the Southern District of New York issued warrants for their arrest in pursuance of § 651 of Title 18, U. S. Code; the

writs were allowed at this point in the proceedings. The relators agree that they cannot succeed, unless the commissioner had no power to hold them awaiting the outcome of the proceedings, and that he had that power unless our treaty with France does not authorize the Secretary of State under any circumstances to surrender Americans who have committed extraditable crimes in France and sought asylum here. The judge thought that it did so authorize him; for this reason he dismissed the writs and the relators appealed.

The controversy is very narrow; it is limited to the meaning of Article Five of our extradition "convention" with France, which is in these words: "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." The first French extradition treaty was negotiated in 1843, and remained unchanged until 1909; it required both parties to surrender all "persons" without condition, and under our interpretation of such clauses, it covered nationals of the [fol. 54] contracting parties. Charlton v. Kelly, 229 U. S. 447. But France, following a tradition more than a century old in 1843, did not so understand the words, and we had never been able to secure the delivery of a Frenchman for trial. She regarded it as an equivalent that, unlike ourselves, she will prosecute her nationals for crimes committed abroad. The language of Article Five appears for the first time in our extradition treaty with Prussia of 1852; it is in contrast with Article 24 of the almost contemporaneous treaty with the two Sicilies of 1855, which explicitly exempted "citizens and subjects of each of the high contracting parties". So it might be plausibly argued that throughout the fifties and sixties the Prussian clause meant that, although the parties were not obliged to surrender their own nationals, they reserved a discretionary power to do so; while internationally this would indeed be brutum fulmen, it might have its uses domestically. The Prussian clause appeared in substantially the same form in eight treaties between 1852 and 1874 without apparently raising any question;* but in that year the point was mooted under

* Bavaria, 1853; Hanover, 1855; Austria, 1856; Baden, 1857; Norway and Sweden, 1860; Mexico, 1861; Peru, 1870; Belgium, 1874.

the Mexican treaty of the surrender of a Mexican, who having committed a crime in Texas, fled to Mexico. Secretary Fish refused to request the Mexican authorities to surrender him, and although his reasons are apparently not now accessible, the ruling itself was inconsistent with the belief that the clause reserved to both parties a discretionary power of surrender. If it did, it certainly was his duty to ask for the exercise of that discretion. In 1884 the con- [fol. 55] verse situation arose; an American, having committed an extraditable crime in Mexico, sought asylum here. Secretary Freylinghuysen refused to deliver him upon demand by Mexico, following the precedent of 1874. This ruling does not as such deny the existence of a discretionary power, but the reasons given at the time did deny it, for the treaty was construed as absolutely exempting nationals. The same sort of case arose again in 1888 and Secretary Bayard also refused to surrender the fugitive, accepting the ruling of Secretary Freylinghuysen and giving the same reasons more explicitly. Finally in 1891 as in 1874 a Mexican who had committed an extraditable crime here fled to Mexico. Secretary Blaine following the earlier precedents, refused to demand his surrender, declaring that the clause had been "held to preclude the surrender of a citizen of the United States"; and that for this reason "the government is precluded from demanding the extradition of fugitives in the present instance." In the same year a writ of habeas corpus came on before Judge Maxey in the Western District of Texas, to discharge from arrest an American woman charged with having killed a man in Mexico. Ex parte McCabe, 46 Fed. Rep. 363. He sustained the writ, particularly relying upon the four precedents we have just cited. We are not immediately concerned with the correctness of that decision when rendered, though it was never appealed; but the fact that the treaty had been judicially as well as diplomatically construed is of importance.

Five years before, in 1886, when Secretary Fish's ruling was already twelve years old, and Secretary Freylinghuysen's was two, we negotiated an extradition treaty with Japan in which a variant for the first time appeared: [fol. 56] "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to

do so." It will be at once observed that this did explicitly confer a discretion, which, as we have suggested, the Prussian clause might perhaps have originally borne. With these alternatives before us, we negotiated seventeen extradition treaties between 1891 and 1909, and three more in 1909, including that at bar. Of these, fourteen adopted the Prussian clause,* and six, the Japanese.** Since 1909 the first has been repeatedly used, but the second apparently disappeared in 1905.

The Supreme Court in 1913 had before it an extradition treaty with Italy, which, like the French treaty of 1843, required the surrender of all "persons" unconditionally.*** This the court held to include an American fugitive from Italy, though Italy, like France, refused to reciprocate, insisting that her power to prosecute her own nationals for crimes committed abroad was an equivalent. The decision is not therefore in point here, but the opinion (pp. 467, 468), classified our treaties into two classes, those [fol. 57] which require the surrender of nationals, and those in which the Prussian clause "exempts" them. Significantly the court speaks of the Japanese clause as a "qualification" of only the first. We cannot entirely disregard this language, as the respondent would have us do, though it is true that it is not as authoritative as though the case had turned upon it. A ruling of an English court (In Re Galway, (1896) 1 Q. B. 230), merely goes to show how completely the clause should be interpreted by its history. Before 1887 the extradition treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. Regina v. Wilson, 3 Q. B. 42. In that year it was amended and what we have called the Prussian clause was substituted. Obviously the amendment meant to make a change; it would make none at all, if the court continued to treat it as an exemption. The situation was just the reverse

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*Sweden, 1893; Norway, 1893; Peru, 1899; Chile, 1900; Bolivia, 1900; Belgium, 1901; Servia, 1901; Denmark, 1902; Cuba, 1904; Spain, 1904; Panama, 1904; Honduras, 1909; Dominican Republic, 1909; France, 1909.

**Argentina, 1896; Orange Free State, 1896; Mexico, 1899; Guatemala, 1903; Nicaragua, 1905; Uruguay, 1905.

***Charlton v. Kelly, 229 U. S. 447.

of that before us now; that is, an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant for us can therefore be inferred, because In Re Galway held that a discretionary power had been conferred.

It appears to us that the language of Article Five is not so uncompromising as to be immune from interpretation; few statutes are. A treaty is a contract, and a contract does not prescribe that the parties shall retain their freedom of action, unless it means to exempt them from other stipulations it may contain. An extradition treaty "binds" the parties, and as to matters which it was not meant to bind them, it was natural to say that they should not be "bound"; from that it is not to be assumed that they meant in addition gratuitously to assert that they reserved the [fol. 58] power to surrender their own nationals if they chose. They could do so without any such reservation. Ker v. Illinois, 119 U. S. 436; Greene v. U. S., 154 Fed. Rep. 401, 410 (C. C. A. 5); U. S. ex rel. Donnelley v. Mulligan, 76 Fed. (2) 511 (C. C. A. 2). True, we did just that in the Japanese clause, and it was unnecessary internationally; but, as we have already suggested, it may have been adopted to give the Secretary power under our implementing statute, § 651, Title 18, U. S. Code, which requires that there shall be some "treaty or convention for extradition". That means not only that a treaty exists, but that it assumes to cover the situation. If it be once conceded that the words do not speak so clearly that usage and practical construction are irrelevant, the relators' construction is surely right, for it would be hard to imagine a setting more convincing. The uniform rulings of four secretaries of state, backed by that of a court, were surely not disregarded when the words so construed were used later. This conclusion is confirmed by the parallel use on a number of occasions of the Japanese alternative, in which exactly that provision is explicitly adopted which the precedents declined to find implicit in the original. Finally, it is not likely that in dealing with France, a country whose position had been declared for over a hundred and fifty years, and which we knew would under no circumstances surrender her nationals, we should have reserved to her a discretion to do what she had consistently refused to do in the face of more peremptory words; or to ourselves a discretion to accept a unilateral burden.

It is indeed unfortunate that there should be no way by which the relators can be punished, if they are guilty; and [fol. 59] we should feel free to act more drastically if we had before us only customary law which had persisted beyond the period which had created it, and yet had not called forth enough opposition for its repeal. But we are dealing with a clause chosen by the President and Senate out of the diplomatic locker, and encrusted with its proper traditions, which in such matters count for much. Nielson v. Johnson, 279 U. S. 47, 52; Factor v. Laubenheimer, 290 U. S. 276, 295. Even though we thought we could infer how they would act in this specific case, a decent reserve and a justified doubt should restrain the substitution of our own judgment for the words they selected. But it is by no means self-evident that they would consider the prosecution of Frenchmen in French courts an equivalent of their surrender; and even if they did, other considerations might block a bargain, for into diplomatic negotiations much enters which does not see the light. Though we were not ourselves disposed to higgle, we should have no right to impose our disposition upon the result of their negotiations. The arguments by which the exemption is defended may not indeed be persuasive; "les juges naturels" may be no more than an euphemism for friendly bias; but nationalism is not dead, and most nations have shown a persistent repugnance to submit their citizens to foreign courts. We have indeed an honorable record; but it is uncertain how far our diplomacy is yet prepared to give where it does not receive.

Orders reversed; relators discharged.

Judge Manton dissents, with opinion.

[fol. 59½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. U. S. ex rel. Niedecker v. Valentine. (3 cases.) Opinion. L. Hand, C. J.

[fol. 60] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

[fol. 61] MANTON, Circuit Judge (dissenting):

This is a consolidated appeal by the relators B. Coles Neidecker, George W. Neidecker, and Aubrey Neidecker, who admittedly have always been citizens of the United States, from orders entered on August 21, 1935, dismissing their several petitions for writs of habeas corpus. The relators were taken into custody by the Police Commissioner of the City of New York under warrants issued by the United States Commissioner on July 25, 1935, upon

complaint of the acting Consul General of France in the City of New York, charging relators with crimes clearly extraditable under Article II of the Treaty of Extradition of January 6, 1909, between the United States and France.

Their petitions for writs of habeas corpus are grounded on, first, that American citizens are absolutely and of right exempt from extradition to France under Article V of said treaty; and, secondly, that to construe Article V as giving the Chief Executive a discretion to surrender a citizen would amount to an unconstitutional delegation of power and, moreover, in violation of the Fifth Amendment.

While neither question is new in Anglo American jurisprudence, the paucity of direct judicial precedents and their apparent conflict, make it imperative that we examine it afresh and in some detail, with a view to determining which of the divergent views expresses for this court the correct construction of provisions couched in the terms of Article V of which there are a large number in our other treaties with foreign powers.

[fol. 62] Under Article I of the treaty here involved, the contracting powers "mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes or offenses" mentioned in Article II, "shall seek an asylum or be found within the territories of the other." Under Article V, "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

These two articles represent the most satisfactory formula conceived thus far to reconcile two seemingly conflicting tendencies in the plane of international penal law. The one tendency is toward the fullest possible international cooperation for the suppression of crime by facilitating the apprehension of common criminals who have escaped from the territorial jurisdiction of the locus delicti; the other tendency is toward the protection of nationals against prosecution in foreign tribunals infiltrated with national, racial or religious animosities, or administering a cruel, inhuman or antiquated system of laws or refusing reciprocity. These two tendencies thus present delicate questions of law and policy which it has been the constant effort of Statesmen and jurists to reconcile.

The extradiction of nationals has been, unquestionably, one of the most debated topics of international concern;

and although the weight of policy is apparently against it, yet, the weight of law is for it. Dealing, as we are, with a French treaty, it is not amiss to advert to the legislative history of France, which has not been entirely uniform [fol. 63] on this question. In 1376 France and Savoy made a treaty for the reciprocal extradition of criminals, which applied also to their respective nationals: omnes et singulos homines nostros nobis mediate vel immediate subjectos, qui delinquerunt et quomodolibet in futurum in comitatu Sabaudiæ. (5 Isambert's Recueil Général des Anciennes Lois Françaises, 479). An imperial decree of October 23, 1811, outlined the procedure to be observed by the French authorities in acquiescing to the demands for the extradition of French subjects. (12 Bulletin des Lois [1836] 324). On the other hand, the Extradition Laws of April 4, 1879 (Art. 1) and of March 30, 1927 (Art. V), forbid his extradiction. This reversal in the practice of extradition has been due, as will be shown presently, to the exaggerated development in the continental Europe of the conception of personal jurisdiction, which has not, however, found much favor in the Anglo-American school of legal thought. Be this as it may, it is quite safe to say that the tendency in more recent times has been decidedly to discard the false arguments with which the practice of the non-extradition of nationals has been upheld and to provide, in one form or another and under proper guarantees, for their extradition; and this practice is more consonant with the true principles and spirit of international penal law. Over a century ago, Chief Justice Marshall, in the case of The Exchange (7 Cranch. 116, 144) announced the principle that:

"When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of [fol. 64] trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption."

This general principle has found concrete application to the question of the extradition of nationals. The Supreme Court, in Neely v. Henkel (180 U. S. 109, 123), said:

"We are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the community whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States."

In England, the Court of Queen's Bench in Queen v. Glanz (1882) 9 Q. B. D. 93, 100, stated the same view.

"I would say that the leading principle which underlies all questions of nationality as applied to crime committed within any particular country is this. Whatever rights, civil or otherwise, a man may have which may be affected [fol. 65] by his domicile, it is and must be perfectly clear by the law of all nations that each person who is within the jurisdiction of a particular country under which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilized method."

That this is the doctrine of International Law is the opinion of the Supreme Court in the case of Charlton v. Kelly (229 U. S. 447, 467), wherein that court, after a searching inquiry into the question, delivered itself thus:

"The conclusion we reach is that there is no principle of international law by which citizens are excepted out of an agreement to surrender 'persons', where no such exception is made in the treaty itself. Upon the contrary, the word 'persons' includes *all* persons when not qualified as it is in some of the treaties between this and other nations."

The Supreme Court of Mexico in 1878, speaking through Chief Justice Vallarta (one time Minister for Foreign Af-

fairs of his country), in the case of the Extradition of J. M. Dominguez and F. Barrera (1 Vallarta, Cuestiones Constitucionales [1879] 1, 35), Mexican citizens whose surrender was demanded by the authorities of the United States, said that the extradition of nationals is "a *desideratum* of the most enlightened publicists; is a tendency toward the international well being of nations; is a requirement of civilization, which does not wish that the operation of justice should stop at the frontiers."

[fol. 66] International recognition for this principle has not been wanting. Article 20 of the Montevideo Treaty on International Penal Law (1888-1889) provides:

"Extradition exercises all its effects, and in no case shall the nationality of the accused prevent it."

The most recent legal scholar to express an opinion on this question is Prof. Puente who, commenting this article observes (Principles of International Extradition in Latin America, 28 Mich. Law Rev. [1930] 710) that it rests "on far more tenable grounds than the doctrine to which we have alluded [of the non-extradition of nationals]—a doctrine which, in a veritable sense, is a survival from an age more primitive in the concepts and administration of substantive and adjective law than our own. The present enlightened state of public opinion in the countries comprising the family of nations; the tolerably moderate character of their laws; the generally honorable, impartial and competent composition of their judiciary; and finally, the potential danger of diplomatic interposition by foreign governments in behalf of their nationals in the event of a miscarriage or denial of justice: these evident factors, when taken together, show, beyond a doubt, the untenableness of the prevailing opinion in Latin America and elsewhere today in respect to the surrender of their own nationals for trial in the tribunals of a foreign state."

So much, then, for the history of this interesting subject. As we approach the analysis of the specific treaty and statutory provisions before us, we find that the sum total of the obligations assumed by the contracting states is "to [fol. 67] deliver up persons" (Art. I, Treaty of January 6, 1909, 3 Malloy's Treaties, 2580) accused of certain crimes; and that in order to carry out this obligation Congress has

outlined the procedure to be followed in effecting the provisional detention of such "person" (§§651, 653, Tit. 18 U. S. C. A.). In both cases the term employed to designate the subject of the request for extradition is "person". In the opinion of the Supreme Court in Charlton v. Kelly (229 U. S. 447, 465, 467), the term "persons" employed in Article I of the Treaty of Extradition of March 23, 1868 between this country and Italy was held to include etymologically, "citizens as well as those who are not." Article V of the French treaty recites, of course, that: "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." The question is whether this provision excludes absolutely the surrender of a citizen, or merely clothes the Chief Executive with a discretion to grant such surrender or not, as the circumstances of each case may dictate. It is upon this very question that the courts are in disagreement. Appellants cite in their support the case of Ex parte M'Cabe (46 Fed. [D. C. W. D. Tex.] 363) decided in 1891; and appellees rely on the English case of In re Galwey [1896] 1 Q. B. D. 230. The M'Cabe case had under consideration Article VI. of our Treaty of Extradition with Mexico of 1861, which is identical with Article V. of the French Treaty now before this court. The Galwey case involved Article I. of the Treaty of Extradition of 1876 between Great Britain and Belgium, as amended April 21, 1887, which said that: "In no case, nor on any consideration whatever, shall [fol. 68] the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization." Disregarding inconsequential changes of phraseology, the effect of these provisions is that the contracting governments shall not be bound to give up their own nationals to the other. The court in the M'Cabe case considered the request of the Mexican authorities for the extradition of a citizen of the United States charged with murder; and while it said that under Article I of the Treaty the term "persons" would justify the surrender of a citizen, it made the following dogmatic declaration without any exposition of reasons in its support:

"But the treaty does not stop there. A subsequent limiting clause denies the obligation to surrender a citizen: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty'.

The obligation to deliver being denied, upon what can rest the authority?"

The whole fabric of the M'Cabe case rests on what was called the "practical construction given that article by the department of state", in the Primble case in 1889. In that case, Secretary of State Frelinghuysen said:

"The treaty confers upon the President no affirmative power to surrender an American citizen * * * I understand the treaty with Mexico as reading thus: The President shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States."

[fol. 69] The construction placed upon the terms of a treaty by the department of our government charged with the supervision of the foreign relations of the nations is entitled to respectful consideration and to much weight (Charlton v. Kelly, 229 U. S. 447, 468; Sullivan v. Kidd, 254 U. S. 433, 442); but, as the construction of a treaty is a judicial question (Sullivan v. Kidd, supra), the courts are not necessarily bound by an executive construction which they may deem to be erroneous, and must, therefore, be at liberty to use their independent judgment in arriving at the true meaning of its provisions. This was very clearly and forcefully illustrated in United States v. Rauscher (119 U. S. 407), in which the official construction placed by the American Secretary of State, Mr. Fish, on the treaty of extradition with Great Britain of 1842, was rejected by the court in favor of the construction urged by the British Foreign Minister, Lord Derby. It is difficult to accept Secretary Frelinghuysen's construction of the Mexican treaty for two reasons. In the first place, it is not correct to say that the treaty does not confer upon the President an "affirmative power to surrender an American citizen." Article I does that when it provides for the extradition of "persons". Charlton v. Kelly, supra. In the second place, the Secretary's construction changed the extradition formula from the discretionary to the prohibitive, and in doing so, he did not merely construe the treaty,—he also changed it.

In opposition to the views of our Executive Department, and incidentally to show the evident lack of consistency on

[fol. 70] the part of our authorities in construing the treaty under consideration in the M'Cabe case, I cite the construction given by the Supreme Court of Mexico in 1878 to Article VI of that treaty, in the matter of the Extradition of J. M. Dominguez and F. Barrera, supra, both of whom were citizens of Mexico, arrested upon request of the American authorities. Chief Justice Vallarta, speaking for the court, said (1 Cuestiones Constitucionales [1879] 34):

"It has been claimed that the final clause of article 6 of the treaty of December 11, 1861, prohibits, or at least does not authorize the extradition of nationals. This cannot be asserted without disregarding the value of the words of our language. The treaty of extradition celebrated with Italy, prohibits that extradition when it expresses itself thus: 'The extradition shall not take place if the accused is a national of the country' etc. Between those words and those of the treaty celebrated with the United States, which read: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty': between both clauses, I repeat, there exists all the distance that there is between prohibition and freedom. If the American treaty had intended to even restrict that freedom, it should have used words which would not have left it alive. But to understand both treaties in the same prohibitive sense, is something that the meaning of the words will not permit.

The extradition of nationals may be arranged in treaties in one of three ways: either prohibiting it, as is done in [fol. 71] the treaty with Italy; or making it obligatory, so that the surrender of citizens would be inexcusable; or permitting it—leaving it to the discretion of the Governments, as is done in the final part of article 6 of the treaty with the United States. This makes it difficult to mistake the prohibitive formula with the obligatory, or either of them with the discretionary. From the words of the treaty itself I conclude, therefore, that the extradition of nationals far from being forbidden, is permitted between Mexico and the United States."

A few years after this question in the Supreme Court of Mexico, Lord Russel, C. J., of the Court of Queens Bench in England, in the case of In re Galwey, supra, construing

the treaty of 1887 between Great Britain and Belgium, quoted above, said:

"What does that mean? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition."

We thus have a very respectable weight of judicial opinion, supported by unanswerable arguments, in favor of the discretion or political formula of extradition as illustrated in the Mexican, Belgium and French treaties. If article VI had been omitted from the treaty now before us, would not the relators be liable to extradition under the term "person" of Article I? They certainly would be. Why, then, argue that our government is prohibited from surrendering a citizen merely because it shall not be bound to do so? The two articles should be construed, if possible, in a way [fol. 72] that will not impair each other, unless a different intention is evident from a comparison of their terms; and to construe article VI as giving discretionary powers to the Executive will leave the scope of article I under international law unimpaired, without doing violence to the words or reasonable implications of article VI.

It is true, of course, that Art. IV of the Extradition Convention of 1899 between the United States and Mexico expanded the provisions of Article VI of the Convention of 1861 (considered in the M'Cabe case) to read:

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention; but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

But the reason was merely to clear up doubts cast upon the plain meaning of the provisions of Article VI of the 1861 convention, by an erroneous executive construction accepted without question by an inferior federal tribunal in the M'Cabe case. The amended provision attempts to clarify, but not to amplify, the short statement of Article VI of the 1861 convention. It adds nothing because where the country is not bound but may surrender, discretion is necessarily implied.

Differing from the discretionary formula, is the prohibitive; a sample of which is the Italian treaty quoted by

Chief Justice Vallarta in his opinion, and the Swiss treaty, which was considered by the court of Queens Bench in Queen v. Wilson [1877], 3 Q. B. 42, 44, of which Cockburn, [fol. 73] C. J., said: "The treaty does not give a discretion. It says no British subject shall be delivered up."

This brings us to the last question, namely, whether to construe article V of the treaty as giving the Executive a discretion to surrender citizens, would amount to an unconstitutional delegation of power depriving such citizens of liberty without the due process of law guaranteed by the Fifth Amendment. To clothe the Executive with discretion in such matters, following the approved diplomatic formula, can be regarded as "neither capricious nor arbitrary, as has been supposed, but enlightened by considerations of national convenience which must be borne in mind at every step, and subject to the rules of the law of nations. The latter, which does not guarantee the impunity of crime but which today tends, on the contrary, to enforce respect for the maxim that foreign soil should not be a safe asylum for criminals, enemies of mankind, has commenced to formulate certain theories which are already recognized by civilized peoples. One of them is this: the country which does not give extraterritorial effect to its penal laws over its nationals and which consequently, cannot punish them in its tribunals for the crimes committed abroad, should lend itself to grant the extradition of its nationals, providing considerations of lack of reciprocity, lack of guarantees in the legislation of the demanding state, or others purely political of which the sole judge is the government of the country of asylum, do not oppose the extradition. This theory is defended with unanswerable arguments by con- [fol. 74] temporary publicists of renown, and is already sanctioned in some treaties." (Vallarta, Ch. J., in Extradition of J. M. Dominguez and F. Barrera, 1 Cuestiones Constitucionales [1879] 39).

But the main difficulty with appellants' contention that the discretionary formula is unconstitutional, is that it reflects a false conception of what "due process of law" means, and of the full scope of the treaty-making power of the general government. A treaty, according to the explicit declaration of the Constitution, is part of the supreme law of the land (Art. VI, para. 2, Constitution; Ware v. Hilton, 3 Dall. 199; Missouri v. Holland, 252 U. S. 416). The power

of the national government to enter into treaties is not limited by any express provision of the Constitution, and extends to all proper subjects of negotiation between our government and other nations (Asakura v. Seattle, 265 U. S. 332, 341; In re Ross, 140 U. S. 453, 463; Geofroy v. Riggs, 133 U. S. 258, 267). A proper subject of such negotiation is undoubtedly the extent to and conditions under which the right of a foreign government to claim fugitives from justice will be recognized and enforced. Terlinden v. Ames, 184 U. S. 270, 289. If, then, a treaty gives the Executive a discretion to deliver up a citizen, such provision, being authorized under the Constitution and a part of the supreme law of the land, does not clash in any sense with the Fifth or any other amendment. Hurtado v. California, 110 U. S. 516, 535. A contention similar to this was dealt with in Ex parte Charlton, 185 Fed. 880, affd., 229 U. S. 447, in which Judge Rellstab, in disposing of it, said:

[fol. 75] "The next contention is that, under our Constitution, the accused, being an American citizen, cannot be extradited unless there is a positive obligation on the part of the United States to surrender its citizens when accused of having committed a crime in a foreign country. To extradite, unless there is a positive obligation, is said to be contrary to the constitutional guaranty generally known as the 'due process of law' provision in our Constitution; that in a government like ours, with its constitutional limitations, no American citizen can be surrendered to another country merely out of courtesy or in a spirit of international comity.

Reduced to its last analysis, that contention, I think, is to be determined by this: Whether there is an existing treaty between the United States and Italy which requires that Charlton shall be surrendered to the demanding government. * * * If an extradition treaty subsists with a foreign government, under our Constitution and law of the land, a surrender of the prisoner in pursuance thereof would be in accordance with the 'due process of law' constitutional requirement."

Statesmen, in framing international extradition commitments, must be presumed to anticipate their consequences more or less accurately; and the courts, when inquiring into the meaning of such commitments, should consider carefully the consequences flowing from this or that construction as

the result likely to have been anticipated by the contracting parties, and should never assume that such commitments are intended to bear fruits inimical to the social order. In [fol. 76] construing Article V. we should not assume that the contracting states intended to espouse crime or encourage its impunity. This is, in effect, what appellants urge us to hold. In countries where the penal legislation crimeas personal, and punishes the citizen or subject for crimes he may commit abroad (e. g. Art. 5, Code d'Instruction Criminelle, France; Art. 7, Code Penal, Denmark; Art. 4, sec. 1, Code Penal, Poland; Art. 9, Codice Penale, Italy; Art. 12, Codigo Penal, Spain), the construction advocated by appellants might be entitled to weight; but in countries where crime is regarded as territorial and punishable only in the locus delicti, as it is here, to construe a treaty as exempting a citizen from extradition, except in the clearest case, would tend to encourage disturbances in the social order of foreign nations, and to reward the wrongdoer with impunity the moment he takes refuge in our midst. I cannot reasonably suppose that such was the intention of our government in agreeing to those provisions. Such result would constitute what Chief Justice Cockburn called a "blot upon the law." Queen v. Wilson, supra. This question gains support in Wharton, who says [1 Digest of Int. Law, 2d Ed. 1887, § 273, p. 807]:

"Where the question is one of discretion, the better rule is that wherever, by the jurisprudence of a particular country, it is capable of trying one of its subjects for an offense alleged to have been committed by such subject abroad, the extradition in such case should be refused, the asylum state then having the right of trying its own subject by its own laws. When, however, it does not assume jurisdiction of [fol. 77] extraterritorial crimes committed by its subjects, then extradition should be granted."

The judgment should be affirmed.

[fol. 77½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Ex Rel Neidecker vs. Valentine, etc. (Copy.) Dissenting opinion. Manton, Circuit Judge.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 20th day of January one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon Harrie B. Chase, Circuit Judges.

UNITED STATES ex Rel. B. COLES NEIDECKER, Relator-Appellant,

vs.

LEWIS J. VALENTINE, Police Commissioner, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with instructions to discharge the relator.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 79] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex Rel. B. Coles Neidecker, vs. Lewis J. Valentine, Police Commissioner. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1936. William Parkin, Clerk.

[fol. 80] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York on the 20th day of January one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon Harrie B. Chase, Circuit Judges.

UNITED STATES ex Rel. GEORGE W. NEIDECKER, Relator-Appellant,

vs.

LEWIS J. VALENTINE, Police Commissioner, etc., Defendant-Appellee

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On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with instructions to discharge the relator.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 81] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex Rel. George W. Neidecker vs. Lewis J. Valentine, Police Commissioner. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1936. William Parkin, Clerk.

[fol. 82] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 20th day of January one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon Harrie B. Chase, Circuit Judges.

UNITED STATES ex Rel. AUBREY NEIDECKER, Relator-Appellant,

vs.

LEWIS J. VALENTINE, Police Commissioner, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with instructions to discharge the relator.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 83] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex Rel. Aubrey Neideicker vs. Lewis J. Valentine, Police Commissioner. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1936. William Parkin, Clerk.

[fol. 84] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 83, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex Rel. B. Coles Neidecker, Relator-Appellant, against Lewis J. Valentine, Police Commissioner, etc., Defendant-Appellee (and two other cases), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighth day of February, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 85] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 804

ORDER ALLOWING CERTIORARI—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 86] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 805

ORDER ALLOWING CERTIORARI—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 806

ORDER ALLOWING CERTIORARI—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 40,358, 40,359, 40,360. U. S. Circuit Court of Appeals, Second Circuit. Term No. 804. Lewis J. Valentine, Police Commissioner of the City of New York, et al, etc., petitioners, vs. The United States of America, on the Relation of B. Coles Neidecker. Term No. 805. Lewis J. Valentine, Police Commissioner of the City of New York, et al, etc., petitioners, vs. The United States of America, on the Relation of George W. Neidecker. Term No. 806. Lewis J. Valentine, Police Commissioner of the City of New York, et al, etc., vs. The United States of America, on the Relation of Aubrey Neidecker. Petition for writs of certiorari and exhibit thereto. Filed March 9, 1936, Term Nos. 804, O. T., 1935, 805, O. T., 1935, 806, O. T., 1935.